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ADMINISTRATIVE-JUDICIAL PROTECTION OF ELECTORAL RIGHT
- with analysis of the judicature of the administrative court of Serbia -*

Abstract

The subject of analysis in this paper are regulations that govern the judicial protection of electoral right, especially the cases brought before the Serbian Administrative Court during the parliamentary and local elections of 2012 and 2014, the former of which are remembered by a number of alleged irregularities. We used a standard legal methodological apparatus to analyze the normative framework for administrative and judicial protection of electoral right. The paper analyzes the jurisprudence of all departments of the Serbian Administrative Court, with special emphasis on the cases of the Niš Unit of the Administrative Court.

Key words: elections, administrative court, electoral commission, complaint, appeal

УПРАВНО-СУДСКА ЗАШТИТА ИЗБОРНОГ ПРАВА
−са анализом праксе управног суда Србије −

Апстракт

Предмет анализе у овом раду били су прописи који уређују судску заштиту изборног права, а нарочито предмети које је решавао Управни суд Србије

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током парламентарних и локалних избора 2012. и 2014. године, од којих су ови први упамћени по великом броју наводних неправилности. Аутори су користили стандарни методолошки апарат приликом анализирања нормативних оквира управне и судске заштите бирачког права. Судска пракса свих одељења Управног суда Србије била је предмет обраде, а посебан нагласак стављен је на нишко одељење овог Суда.

Кључне речи: избори, Управни суд, изборна комисија, приговор, жалба

INTRODUCTORY REMARKS

The history of electoral law in Serbia is rich and long. It became a constitutional category with the constitutional acts of Duke Mihailo in 1861, and gains full momentum in the 1869 Constitution. The application of electoral law has traditionally been followed by its infringements, mostly through political pressures in the course of political campaign, but also through post-electoral preclusion of electoral right, which was often a subject of heated parliamentary arguments (Stenographic Notes from the Assembly Sessions of the Principality and Kingdom of Serbia, 1869; 1888). In the Kingdom of Serbs, Croats, and Slovenes, after the era of parliamentarism under the 1921 Constitution, in some cases even the state was "silent" on the issue of elections for representative bodies (i.e. Senate), with the explanation that political circumstances as well as administrative-territorial changes in the state (creation of the Banovina of Croatia) made the elections impossible. Electoral law and infringements thereof after the Second World War is certainly a topic susceptible to lengthy analyses, with more political than legal features. With the return of representative democracy in the 1990s, the electoral law and its protection got a fresh start. Introduction of the administrative-judicial protection of electoral right and the shift of jurisdiction from ordinary to administrative courts represents a new step forward.

Through participation in elections, the political subjects exercise their electoral right, as a democratic, general, equal, direct, and discretionary right. Therefore, elections represent the most important form of institutionalized participation of citizens in social life and have no bearing on the socio-structural differences (Nohlen, 1982, pp. 20-25).

The electoral right is a complex right, encompassing a number of related rights: active and passive electoral right, right to enlist as a voter, right to be informed, right to be a candidate, and right to protection of the representative mandate (Nastić, 2011, p. 52). Understood as such, the electoral right is also called material electoral right, which essentially includes rights and duties of the participants in the electoral process, which determines their status and role in the elections.

Procedural electoral law, on the other hand, consists of rules regulating the course and content of the electoral process. It has its original, specific rules, which regulate the procedures for conducting certain electoral activities (candidacy procedure, voting procedure, result determination procedure, and voter registration), as well as subsidiary rules, which regulate administrative proceedings, court proceedings (administrative disputes), administrative-judicial proceedings (electoral disputes, constitutional appeals), or infringement proceedings.

In the Article 52 of the Constitution of the Republic of Serbia the electoral right is established as general and equal, the elections as free and direct, and the voting as secret and personal. Likewise, the preconditions for active and passive electoral right (being of age, of legal capacity, and having Serbian citizenship) are determined, and the protection of electoral rights in accordance with the law guaranteed. The constitutional determination of electoral right generally applies to all kinds of direct elections in the Serbian legal system.

The normative framework for the administrative-judicial protection of constitutional rights in Serbia consists of the relevant domestic regulations as well as the ratified international treaties, beginning with the Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia, No. 98/2006). In addition, the primary legal sources are the Law on Election of Members of Parliament (Official Gazette of the Republic of Serbia, No. 35/2000, 57/2003 − the decision of the Constitutional Court of the Republic of Serbia, No. 72/2003 − as amended, 75/2003 − correction of the amendment, 18/2004, 1 1/2005 – as amended, 85/2005 − as amended, 28/2011 – the decision of the Constitutional Court of the Republic of Serbia, 36/2011, and 1 4/2009 − as amended), the Law on Local Elections (Official Gazette of the Republic of Serbia, No. 129/2007, 34/2001 − the decision of the Constitutional Court of the Republic of Serbia, and 54/2011), and subsidiary sources – relevant procedural laws and other regulations: the Law on General Administrative Procedure (Official Gazette of the Republic of the Federal Republic of Yugoslavia, No. 33/97 and 31/2001 and Official Gazette of the Republic of Serbia, No. 3/2001), the Law on Administrative Disputes (Official Gazette of the Republic of Serbia, No. 111/2009), and others.

Based on the abovementioned laws, different administrative authorities, such as electoral commission, enact a number of by-laws, most often for every separate election (Rules of the Republic Electoral Commission – Official Gazette of the Republic of Serbia, No. 5/2012).

Hence, for the purpose of the election of members of parliament and the president of the Republic, scheduled for May 6, 2012, the commission enacted, among others, the Instructions for Implementing the Election for Members of Parliament and for the President of the Republic (Official Gazette of the Republic of Serbia, No. 29/2012), the Timeframe for

Conducting Electoral Activities, referring to the procedures for electing MPs and the president of the Republic, scheduled for May 6, 2012 (Official Gazette of the Republic of Serbia, No. 2/2012 and 28/2012), and Rules on the Work of Electoral Committees for the Coordinated Implementation of All Elections Scheduled for May 6, 2012 (Official Gazette of the Republic of Serbia, No. 29/2012).

In 2014, following the Government's proposition, the President of the Republic of Serbia has dissolved the National Assembly of the Republic of Serbia by Decree and, at the same time, issued the Decision on Calling the Election for Members of Parliament (Official Gazette of the Republic of Serbia, No. 8/14).

Afterwards, the Republic Electoral Commission issued numerous regulations necessary to conduct the elections, the most important of which are:

- Timeframe for Conducting Electoral Activities in the Procedure of Implementing the Election for Members of Parliament, scheduled for March 16, 2014;
- Instructions for Implementing the Election for Members of Parliament, scheduled for March 16, 2014 (Official Gazette of the Republic of Serbia, No. 12/2014);
- Decision on the Fees and Other Expenditure Pertaining to the Activities of the Republic Electoral Commission on Implementing the Election for Members of Parliament, scheduled for March 16, 2014,
- Decision on Coordinated Implementation of the Election for Members of Parliament and Members of Local Self-government Assemblies, scheduled for March 16, 2014 (Official Gazette of the Republic of Serbia, No. 9/2014),
- Decision on Selection of a Printing House for Printing Ballots and Other Material for Implementing Election for Members of Parliament, scheduled for March 16, 2014,
- Decision on Designation of the Colour of Ballots and Control Ballots for Verification of Functionality of Ballot Boxes Used for Voting in the Election for Members of Parliament, scheduled for March 16, 2014 (Official Gazette of the Republic of Serbia, No. 9/2014).

ADMINISTRATIVE-JUDICIAL PROTECTION OF ELECTORAL RIGHT

Depending on the time it is being provided, the protection of electoral right can be:

1) the protection of electoral right provided during the electoral process (electoral disputes);

2) the protection of electoral right provided immediately after the termination of electoral process (mandate verification proceedings); and

3) the protection of electoral right in between elections – protection of rights of MPs, i.e. protection of exercising electoral right (Nastić, 2011, p. 60).

Regarding the procedures for the protection of electoral right in the course of the elections, any voter, candidate, and submitter of a list of candidates is entitled to file a complaint no later than 24 hours after a decision, action, or omission of the electoral board that resulted in the infringement of the electoral right, or created the irregularities with respect to candidacy or elections. The addressee of the complaint is the Republic Electoral Commission, which makes a decision no later than 48 hours after receiving the complaint, and serves it to the submitter of the complaint as well as to the submitters of all lists of candidates. If the Republic Electoral Commission upholds the complaint, it will annul the contested electoral decision or action. If the Republic Electoral Commission does not decide within the prescribed timeframe, it will be deemed that the complaint has been upheld. This is the so-called "positive silence of the administration", which is an exception to the generally applied rule that the silence of administrative authority on a subject's motion implies the dismissal of the motion.

It is possible to file an appeal against any decision of the Republic Electoral Commission on the filed complaint to the Administrative Court (previously to the Supreme Court), which "decides on appeals by the accordant application of the statutory provisions that regulate the proceedings in administrative disputes". The appeal is filed through the Republic Electoral Commission no later than 48 hours after the reception of the decision. The Republic Electoral Commission is obliged to transfer case files to the Administrative Court no later than two hours after the reception of the appeal. The decision on the appeal is due no later than 48 hours after the reception of appeal and the case files. The Decision made in the appeal proceedings is final and binding and not subject to extraordinary legal remedies provided for in the law regulating administrative disputes. If the court upholds the appeal and grants the annulment of the electoral activity or elections, the annulled activity or elections will be repeated in no more than ten days (see provision of Article 97 of the Law on Election of Members of Parliament).

According to the Law on Local Elections, the Administrative Court decides on the following appeals: against the decision of the assembly of the local self-government on appointing the chairperson and the members of the permanent electoral commission, which is filed no later than 24 hours after the decision is issued (Art. 14, Para. 11 of the Law); against the decision of the assembly of the local self-government on cessation of a representative's mandate, as well as on the confirmation of a new

representative's mandate (Art. 49); against the decision of the electoral commission, which the interested party may appeal in the Administrative Court – this appeal may be filed no later than 24 hours after the decision has been served (Art. 54); against the decision of the assembly of the local self-government on the confirmation of representative's mandate – this appeal may be filed no later than 48 hours after the decision has been made (Art. 56, Para. 7).

The Court's decision on the appeal is final and cannot be subject to motion for reconsideration or for repeated proceedings. If the court upholds the appeal, it will annul the decision or the activity in the candidacy or election process, or the election of a local representative. It should be underlined that the Law on Local Elections contains the provision on the possibility to make a decision in the dispute of full jurisdiction, which is typical of administrative disputes. If the Court finds that the disputed decision should be annulled, if the nature of the case allows it, and if the established facts provide the reliable grounds, the Court may resolve the electoral dispute on the merits by making a new decision, which replaces the annulled one. It must be emphasized that the Administrative Court does not have such authority with respect to disputes related to the election of MPs. As we shall subsequently demonstrate, such decisions are not rare in the current judicature of the Administrative Court, which represents a step forward toward the Court's pro-activism in resolving administrative-electoral matters on its own.

If a complaint or an appeal result in the annulment of the electoral activity or the elections, the electoral commission is mandated to repeat the activity or the elections within the timeframe prescribed for the repeated elections, starting from the day the decision on the annulment has been issued. The Law on Local Elections, as a subject-specific law, does not contain provisions on other types of decisions (e.g. on denial or dismissal of the appeal); hence, when making such decisions, the Court needs to adhere to the Law on Administrative Disputes.

Significantly determinative of the election procedure is the fact that the Law on Local Elections regulates specific stages (candidacy, implementation, and determination and publication of results), in which all persons subject to electoral right protection (every voter, candidate for representative, and proposer of a candidate) may request such protection. The stages are separated, so protection of electoral right on the grounds of irregularities in any stage may be sought only until the termination of the given stage (Vuković, Vučetić, 2013, p. 58).

THE STANCE OF THE ADMINISTRATIVE COURT OF THE REPUBLIC OF SERBIA

The number of electoral disputes related to the 2012 elections was 633. The subject matter of our analysis is primarily the election disputes under the jurisdiction of the Niš Unit of the Administrative Court (Vuković, Vučetić, 2013, pp. 1-149). However, in order to provide a broader perspective and present the impact some of the decisions may have on the legality of future election processes, in this part of the paper we shall list some of the stances adopted by the Administrative Court in its other units regarding the May 2012 elections. The total number of election disputes pertaining to the 2012 elections, with a court epilogue is 633, according to the data published on the website of the Administrative Court (reference numbers of Court files). We compiled the analyzed decisions, in addition to those published on the Administrative Court website, through the "Paragraf Lex" online database (http://www.paragraf.rs/), and we also received photocopies of some decisions from judges at the Niš Unit of the Administrative Court of Serbia.

As regards the electoral disputes related to the 2014 elections, it is notable that the situation has significantly improved, since there were only 29 disputes, according to the website of the Administrative Court of the Republic of Serbia.

Some of the important standpoints adopted by the Court in the decisions made outside the Niš Unit are as follows:

1. The statements of voters who support by signature a certain list of candidates, given on a form that only contains the name of the list of candidates for which the support is being provided and does not contain the name of the submitter of the list, do not impede the official announcement of the list of candidates (Administrative Court Decision 19 Už 73/2012 from April 11, 2012);
2. In the course of the procedure following a complaint against the decision by the electoral commission of the local self-government unit on the announcement of a list of candidates, the decision on the announcement of the list of candidates can be annulled, but not the list of candidates announced by that decision (Administrative Court Decision 23 Už 42/2012 from March 24, 2012);
3. The title of the list of candidates proposed by a group of citizens, in addition to the fact that it cannot contain the title of the registered political party and the word "party", also cannot contain the word "coalition", since it exclusively suggests a coalition of political parties (Administrative Court Decision Už 43/2012 from March 27, 2012);

4. A written statement by the submitter of a list of candidates that he/she will use public sources to cover the cost of the electoral campaign is untimely if it is submitted to the electoral commission after the submission of the list of candidates, i.e. after the submission deadline for the list of candidates (Administrative Court Decision 14 Už 16/2012 from April 26, 2012);
5. A complaint, as a legal remedy aimed at protecting electoral right, may be filed to the electoral commission only against the decision of that electoral commission or due to irregularities in the election proceedings occurring after the decision to hold the elections has been issued, but not against the decision to hold the elections itself (Administrative Court Decision III-8 Už 94/12 from April 25, 2012);
6. A decision on designating a collective list of candidates may not be annulled due to reasons pertaining to the irregularities that took place in the course of the announcement of individual lists of candidates (Administrative Court Decision III-9 Už 17/2012 form April 27, 2012);
7. The fact that a decision on the complaint does not contain instructions regarding legal remedies, may not influence the assessment of legality of such a decision (Administrative Court Decision I-2 Už 48/2012 form March 29, 2012);
8. The electoral commission is not competent to assess the legality of a concluded coalition agreement that has been certified by a competent court in accordance with the law (Administrative Court Decision Už 103/2012 from April 27, 2012);
9. If an agreement on the formation of a group of citizens that proposes the list of candidates, certified by a competent court, designates the group's representative, that person is entitled to undertake all electoral activities in the name of the group of citizens without the special power of attorney (Administrative Court Decision 20 Už 51/2012 from March 28, 2012);
10. The permanent members of the electoral commission may be proposed only by the groups of representatives that actively participate in the municipal assembly, proportional to the number of representatives of that group in the assembly (Administrative Court Decision I-3 Už 24/12 from March 8, 2012);
11. With the issuing of a final decision to withdraw the list of candidates, the candidates on that list of candidates lose their status of candidates, which removes the obstacle for them to be listed as candidates for representatives on another, subsequently and timely submitted, list of candidates (Administrative Court Decision II Už 98/2012 from April 26, 2012);

12. A group of representatives is entitled to propose a member of the electoral commission of the local self-government assembly only if it has been constituted as a group of representatives in that assembly prior to filing the proposal (Administrative Court Decision III-3 Už 21/2012 from March 16, 2012);
13. The order in which the lists of candidates are submitted is impertinent to the order of their announcement if the lists of candidates contain inadequacies that were mandated for correction by the electoral commission, so in such cases the lists of candidates will be announced in the order of submission of complete and appropriate documentation to the electoral commission. The order in which the lists of candidates are submitted affects the order of the announcement only if there is complete documentation when all lists of candidates have been submitted (Administrative Court Decision III-7 Už 84/2012 from April 17, 2012);
14. The submitter of a list of candidates may be listed as a political party of a national minority for the announcement only if a written proposal has been submitted to the electoral commission together with the list of candidates (Administrative Court Decision 13 Už 1 5/2012 from April 26, 2012);
15. Any submitter of a list of candidates may be allowed insight into submitted and announced lists of candidates and into the corresponding enclosed documentation no later than 48 hours after the collective list of candidates has been announced (Administrative Court Decision 14 Už 41/2012 from March 24, 2012);
16. If a constitutive session of a municipal assembly is summoned by the chairman of the assembly from the previous convocation, according to the deadlines prescribed by the law, and scheduled within two months after the announcement of elections results, the oldest representative of the new convocation, or the second oldest representative, are not authorized to summon the constitutive session of the municipal assembly (Administrative Court Decision III-9 Už 591/2012 from June 25, 2012);
17. In the proceedings for the protection of electoral right, the accordant application of provisions of the Law on Administrative Disputes pertaining to the silence of the administration is not possible (Administrative Court Decision II-2 Už. 27/2014 from March 28, 2014);
18. A list of candidates is consolidated only when 10,000 voters have supported it by signature, so the electoral commission is authorized to review the list of candidates and call for its correction only if 10,000 court-certified statements of support

are enclosed with the list of candidates (Administrative Court Decision 10 Už. 15/2014 from March 5, 2014);

19. If the electoral committee makes any changes in the electoral roll on election day, the electoral committee is dissolved and voting in that polling place is repeated (Administrative Court Decision 13 Už. 23/2014 from March 22, 2014);
20. Electoral procedure is not significantly violated if two members suspected to be related did not take part in the activities of the electoral committee in the same polling place (Administrative Court Decision II-4 Už. 26/2014 from March 25, 2014);
21. The fact that the Republic Electoral Commission omitted to exclude those voters whose statements of support were not certified by the court from the total number of voters supporting a certain list does not influence the legality of the decision to announce that list only if it is supported by the sufficient number of voters whose statements are certified by the court in accordance with the law (Administrative Court Decision 9 Už. 11/2014 from February 14, 2014).

THE ANALYSIS OF JUDICATURE OF THE NIŠ UNIT OF THE ADMINISTRATIVE COURT

The grounds on which the Court dismissed, denied, or accepted appeals referring to the 2012 election are various and differ between Units of the Court. However, the results of a detailed analysis of the Niš Unit judicature indicate some of the most common reasons. The results of this research are based on the analysis of 67 cases that this Unit reviewed, in 27 of which the appeal was denied, in 12 dismissed, and in 28 upheld (Vuković, Vučetić, 2013, pp. 68-103).

Cases in which the Court dismissed appeals. Inobservance of the order of legal remedies, confusion and miscalculation of deadlines for a complaint or an appeal, lack of legal standing *ad causam*, improper submission of appeal, and inobservance of the *ne bis in idem* principle were the most common grounds for dismissal of appeals.

In a large number of cases the Court rejected appeals due to inobservance of the order of legal remedies or ignorance of the law. An appeal is permitted against final decisions of the electoral commission, and may not be filed against the first instance decisions (except against the decisions of the representative bodies, a local self-government assembly, on the appointment of the chairperson and the members of the permanent electoral commission – Art. 14, Para. 11) – a party must resort to a complaint first (Administrative Court Decision I-2 Už 36/12 from March 23, 2012). Such a problem occurred in relation to the appeal against the announcement of the list of candidates, against which,

according to the provision in Article 52, Paragraph 1 of the Law on Local Elections, a voter, a candidate for representative, or a proposer of a candidate is entitled to file a complaint to the electoral commission of the local self-government unit due to certain irregularities no later than 24 hours from the day on which the decision was made or from the day on which the action or oversight occurred. In this specific case, when the decision of the Municipal Electoral Commission of the City of Niš Municipality Crveni Krst, which had not resolved a complaint, was challenged on appeal, the appeal was dismissed for not being allowed (Administrative Court Decision II -1 Už 118/12 from April 26, 2012).

The appeals were often dismissed because appellants confused or miscalculated deadlines for filing a complaint or an appeal (Administrative Court Decision II-1 Už 45/12 from March 29, 2012). Parties made errors and missed deadlines due to drawing erroneous analogies with the elections for MPs (National Assembly), which caused them to file appeals against the decisions of the electoral commission to the Administrative Court through electoral commissions, instead of directing them directly to the Administrative Court, and which often rendered the appeals untimely (Administrative Court Decision II-2 Už 52/12 from March 30, 2012).

On numerous occasions the Administrative Court dismissed parties' appeals out of lack of legal standing *ad causam* (Administrative Court Decisions II-4 Už 46/12 from April 4, 2012 and II-1 Už 526/12 from May 5, 2012). If two persons are authorized by a coalition agreement to propose candidates for representatives and undertake other legal actions on behalf of the coalition, failure of both authorized persons to act implies absence of legal standing (Administrative Court Decision II-4 Už 52/12 from May 3, 2012).

Improper submission of appeal to the city election commission or submission of appeal to the Administrative Court through municipal electoral commissions also entails forfeiture of the right to administrative-judicial protection of electoral right (Administrative Court Decisions I-1 Už 65/12 from April 11, 2012 and I-1 Už 66/12 from April 11, 2012).

In certain cases, appeals were dismissed due to disregard of the *ne bis in idem* principle (Administrative Court Decision II-1 Už 279/12 from May 14, 2012) (Vuković, Vučetić, 2013, pp. 70-77).

Cases in which the Court denied appeals. The Niš Unit of the Administrative Court most often denied appeals on the grounds of prematurity of the complaint or expiration of deadlines for correction.

When ruling on a dispute pertaining to the verification of voters' signatures, the Administrative Court decided that the complaint challenging the signatures prior to the submission of the list of candidates was premature, as the electoral commission assesses the validity of voters' signatures supporting a certain list of candidates as part of the assessment of the list of candidates and of the entire documentation that is to be

enclosed with the list of candidates (Administrative Court Decision I-1 Už 37/2012 from March 20, 2012).

Another case pertained to the adjustment and amendment of the list, and the appellant also challenged the way the "technical operator" of the municipal electoral commission checked the list for flaws and inconsistencies, stating that only members of the commission and not the operator had the authority to perform such a check. The Administrative Court took a stance that in the moment of submission a list of candidates has to contain a sufficient number of support signatures in order to be announced and that the electoral commission may order corrections even after the 24-hour deadline has expired, which extends the statutory deadline for corrections and leads to the conclusion that the prescribed deadline is instructional according to the Court's interpretation (Administrative Court Decision II-4 Už 69/2012 from April 4, 2012).

There were situations in which the appellant disputed a decision for being made in the course of enforcement of the Administrative Court judgement, but with disregard of the Court's mandate and reasoning (which unfortunately happens very often), as well as because of incorrect application of substantive law (Administrative Court Decision II-2 93/12 from April 26, 2012).

In the case from April 30, 2012, the appellant held that all changes regarding the identity of candidates may be made until the list of candidates has been announced, and the Court concluded that the denial of announcement of the list was legal, since the list submitter had failed to make mandated corrections within the extended deadline but did so only after this deadline had expired, and before the decision on the denial of announcement of the list of candidates was made (Administrative Court Decision II-1 Už 139/12 from April 30, 2012).

In one of the rare cases pertaining to elections for MPs that we analyzed, the disputed decision denied the complaint by the authorized representative of the "Coalition of Albanians of the Preševo Valley" as unfounded (instead of dismissing it for missing the deadline). However, the Republic Electoral Commission did not breach the law to the appellant's detriment, as it granted them more rights than they were legally entitled to (Administrative Court Decision II-1 Už 378/12 from May 14, 2012).

In yet another case, an important issue of subsequent rewriting of records or, according to the appellant, of the alleged forgery thereof, was not dealt with on the merits due to formal legal reasons – primarily due to the provision contained in Article 32 of the Law on Local Elections, which stipulates that the representatives of submitters of the list of candidates and the candidates for representatives have the right to inspect the election materials on the official premises of the electoral commission within five days from the day the elections were held, whereby the 24-hour deadline

for filing an appeal begins from the moment the electoral commission has completed the reception of the election materials and filed the data from the polling places, according to the provision of Article 53 of the Law on Local Elections. On the 35th session of the Municipal Electoral Commission of the City of Niš Municipality Pantelej, the appeal was dismissed as untimely and was consequently denied by the Court (Administrative Court Decision II-25 Už 46/12 from May 16, 2012).

The case of the use of mobile phones in the polling place was also interesting. On the occasion in question, the Electoral Commission of the Municipality of Medveđa decided correctly, as deemed by the Administrative Court, when it denied a complaint reasoning that, regardless of the statutory prohibition of use of communication devices in polling places or anywhere in their vicinity, the infringements of such prohibition were not to be considered legal reasons or grounds for the dissolution of the electoral committee and for the repetition of elections in that polling place (Administrative Court Decision II-4 Už 633/12 from July 11, 2012) (Vuković, Vučetić, 2013, pp. 78-86).

Cases in which the Court upheld appeals, annulled the decisions, and ruled cases on the merits. The analyzed cases in which the Court upheld appeals, annulled the decisions, and ruled cases on the merits pertain to the procedures for submission, acceptance, and order of announcement of lists of candidates as well as to meeting the deadlines for certain electoral activities.

In the first case from this group, the Court concluded that the reception of the list of candidates and its announcement represent electoral activities in the candidacy process, which fall within exclusive purview of the electoral commission. The Administrative Court found that the stance of the Municipal Electoral Commission Surdulica that the electoral commission does not have the obligation of attendance in order to receive lists of candidates, but only the obligation to announce lists of candidates, and that the former falls within the purview of the municipal administration of the Municipality of Surdulica, pursuant to the Commission's decision (Administrative Court Decision II-4 Už 40/2012 from March 29, 2012).

Similarly, the second case from this group deals with the protection of electoral right in the procedure of submission of lists of candidates. The Administrative Court concluded that the submission order of lists of candidates does not affect the order of announcement if the lists of candidates contain inconsistencies whose correction was ordered by the electoral commission (Administrative Court Decision II Už 56/12 from April 2, 2012). The Court also ruled on the case in which the Municipal Electoral Commission Pirot dismissed the complaint as untimely, reasoning that on Sunday, March 25, 2012, when the deadline was expiring, there was no attendance duty of the Municipal Electoral Commission. The court assessed that the election process does not recognize "non-working" days

and that it is therefore prohibited to invoke non-working days in the election procedure, since there is no grounds for such a thing in the provisions of the Law on Local Elections (Administrative Court Decision II-4 58/12 from April 3, 2012).

The Administrative Court annulled the decisions of a municipality assembly of a local self-government unit due to breach of provisions contained in Article 13, Paragraph 4 of the Law on Local Elections – failure to state political affiliation of the members of the municipal electoral commission (Administrative Court Decision II-1 Už 53/12 from April 4, 2012). Likewise, after examining the decision challenged on appeal, the Court established that it contained a ruling with names of appointees and the instruction on legal remedies, and lacked court reasoning.

In the following case, the Administrative Court, acting with full jurisdiction in the matter of candidacy, decided on the merits of the case (Administrative Court Decision II-4 Už 88/12 from April 24, 2012). The Court had initially annulled the disputed decision of the electoral commission, which breached the provisions of the Law on Local Elections, and specifically those of Article 18 and Article 22, by applying them too broadly and incorrectly, thus creating a new norm and defining an entirely new category of proposers – coalitions of groups of citizens and political parties. The Court's stance was that preconditions for the application of the Article 55, Paragraph 2 of the Law on Local Elections applied in this case, so it denied the announcement of such a list of candidates.

In another case (Administrative Court Decision II/4 Už 123/12 from April 28, 2012), the Court also denied the announcement of a list of candidates by deciding on the merits. In this specific case, what was actually disputable was the way the City Electoral Commission of the City of Leskovac established that the authorized submitter had corrected the list and adjusted the SGL-8/2012 forms. The proposer had corrected the list of candidates in a prohibited and illegal manner – by applying white nail polish over the incorrectly filled part of the form and overwriting the corrections – and the forms were authenticated by the basic court in Leskovac with the proposer's signature and the court's seal, contrary to regulations referring to authentication of signatures, manuscripts, and copies. Likewise, the inconsistencies of the mentioned list pertain to the fact that the voters' signatures were given to a party that was a member of a coalition, and the signatures that supported the coalition's list of candidates were not authenticated, which could be determined based on the date of authentication.

The Court also annulled decisions of electoral commissions due to breach of procedure, or inconsistencies in the form of their administrative acts. In one such case, a decision of the Electoral Commission of the Municipality of Medveđa was disputed on the grounds that it did not specify on what grounds the complaint had been denied (Administrative

Court Decision II/2 Už 121/12 from April 27, 2012). The Court also ruled on appeal by the party for the breach of its constitutional right to be informed timely, through public media, on the collective list of candidates for the election of representatives of the Medveđa Municipality Assembly, and found that, in the course of the procedure preceding the decision, the rules of procedure were breached to the appellant's detriment (Administrative Court Decision II-1 Už 131/12 from April 30, 2012).

The Niš Unit of the Administrative Court partially upheld the appeal of a party and annulled the decision of the Municipal Electoral Commission of the City of Niš Municipality Crveni Krst regarding polling place No. 11 – Popovac, and polling place No. 25 – Donja Toponica. By the same ruling, deciding in a full jurisdiction dispute, the Court upheld the appeal, declared the elections in the abovementioned polling places null and void due to irregularities in implementing the elections, dissolved the electoral committee in these polling places, and ordered a repetition of the elections in the two polling places (Administrative Court Decision II-1 Už 29 from May 14, 2012) (Vuković, Vučetić, 2013, pp. 86-103).

DISPUTABLE ISSUES OF ELECTORAL LAW

The issues that have drawn greatest attention and provoked many disputes among experts are the *ex officio* protection of electoral right and the application of legal analogy by the Republic Electoral Commission.

The issue of legality of ex officio protection of electoral right

The stance of the Administrative Department of the Supreme Court of the Republic of Serbia on the issue of legality of *ex officio* protection of electoral right was negative in prior cases. In the course of the 2012 elections, the administrative judicature shifted its position regarding the following question: can the electoral commission, in the process of protection of electoral right, without any complaints by entitled participants, on its own, ex officio, annul the elections in an individual polling place due to observed irregularities, e.g. incorrectly calculated results, if the electoral procedure has been declared final (no complaint has been filed)? The previous position of the Administrative Department of the Supreme Court of Serbia was clear – the answer was no. The Court's reasoning was that the principle of officiality, established by the Law on General Administrative Procedure, represents the rule by which an administrative procedure is always initiated by the action of the administrative authority, as opposed to the procedure on the protection of electoral right, which always begins with the action of an authorized submitter of a complaint. The principle of officiality reaches its full realization when the administrative procedure is initiated ex officio, with the purpose of either creating (establishing) a certain obligation for the party or abolishing or reducing a

certain right of the party in order to protect the public interest. The annulment of an election represents an action which does not have a purpose to abolish or reduce a right, but rather to support the essential exercise of the electoral right, the protection of which belongs to its holder. As regards procedures initiated ex officio, as a matter of principle there are no deadlines for its initiation. Hence, this is another reason why the annulment of elections by the Republic Electoral Commission ex officio would be inappropriate for the electoral procedure in which all actions are limited by strict deadlines prescribed by the Law on Election of Members of Parliament (Stojčević, Danilović, Šuput, 2008, p. 15).

Likewise, the provision of Article 24 of the Rules of the Republic Electoral Commission stipulates the accordant application of the Law on General Administrative Procedure only for the complaint proceedings, and not for the entire election process (Plajkić, 2012, p. 28).

However, by the Decision of the Administrative Court Už 409/2012 from May 16, 2012, the appeal by a submitter of a list of candidates against the decision to deny his complaint against the order to correct the records on the determination of election results was denied (the members of the electoral commission concluded that the number of votes was correctly established, but that a technical error occurred when establishing the census of 5%, whereby the total number of valid ballots was considered instead of the total number of voters who voted, so the error had to be corrected ex officio). As opposed to the legal stance taken in some other decisions, in this decision the Administrative Court found that there was room to correct the technical error (Article 209 of the Law on General Administrative Procedure) and that this Law itself should be applied in the electoral proceeding ex officio, the absence of a filed complaint notwithstanding. By the majority of votes of the Administrative Court judges, the previous stance of the Administrative Department of the Supreme Court of Serbia, applied in the aforementioned decisions, was amended without changes in the current regulations. According to the new stance of the Court, "… it is the legal obligation of the Electoral Commission to determine ex officio the real electoral will of the citizens through correct determination and publication of electoral results, in accordance with the provision of Article 15 of the Law on Local Elections. All this in a manner prescribed by Articles 40, 41, and 44 of the stated Law and with the obligation to correct all technical errors in that process" (the decision is publicly accessible on the Administrative Court of Serbia web site: www.up.sud.rs).

Application of legal analogy by the Republic Electoral Commission

On February 28, 2014 a procedure was initiated to assess the legality of the decision of the Republic Electoral Commission that a candidate for an MP on the list of candidates "With the Democratic Party

for a Democratic Serbia" lost his status and that his place on the list should remain vacant.

The appellant claimed that the Law on Election of Members of Parliament does not regulate the institution of withdrawal of candidacy from the list of candidates after the list has been announced by the Republic Electoral Commission, and especially not after it has been declared final. Likewise, the appeal emphasized that the application of the Law on Local Elections by analogy requires the existence of a referential provision in the Law on Election of Members of Parliament. However, there was no such provision in the Law on Election of Members of Parliament.

The Republic Electoral Commission, on the other hand, restated its position and held that all laws of a country represent a unified system, and that "if one situation is regulated by the law, and another, completely identical, is not, it is justified to apply the identical solution in the identical situation, pursuant to Article 20, Paragraph 6 of the Law on Local Elections." As a reminder, the stated provision of the Law on Local Elections stipulates the following: "If a candidate, through a final decision of a court, loses his legal capacity or Serbian citizenship, withdraws his candidacy, or dies after the decision on the announcement of a list of candidates, the submitter of the list of candidates forfeits the right to propose a new candidate."

Unfortunately, the Administrative Court could not resolve this issue on the merits, since the appellant withdrew his appeal.

Although it is not possible to address this dilemma thoroughly in this paper, we will remind the competent public of the following:

Unified Methodological Rules for Drafting Legislation (Official Gazette of the Republic of Serbia, No. 21/2010) in Article 46, Paragraph 2 stipulate the following: "if legal relations regulated by one law require the application of another law by means of analogy, the first law can prescribe the accordant application of the other law."

Unlike accordant application, as a tool for applying (current) law with elements of law interpretation in the narrow sense (linguistic and systemic), the statutory analogy, by the standards of scholars and practitioners, represents the interpretation of law in the broad sense, which results in the establishment of rules in extraordinary individual situations by method of determining similarities of two legal situations, one of which is regulated by the law and the other, although it should be, is not (there is a legal gap), using legal syllogism and teleological interpretation,.

Given the cited provision of Article 46, Paragraph 2 of the Unified Methodological Rules for Drafting Legislation, before a definitive conclusion is drawn, it is necessary to answer the question whether the application of analogy requires (or allows) that such application be prescribed by the law.

CONCLUSION

Based on our analysis, the resulting conclusions may be divided into three groups. The first one pertains to the normative framework of electoral right protection, its deficiencies and specific features, the second to the causes of the inefficiency of the administrative-judicial protection of this right, and the third to the functioning of electoral administration and administrative court.

The election procedure, as a specific administrative procedure, contains several peculiarities that deviate from general rules. Firstly, one such peculiarity is the "positive silence of the administration", which comes into play when the Republic Electoral Commission does not decide on a complaint promptly.

Secondly, the provision from the Law on Local Elections that stipulates that in specific situations the Administrative Court can resolve an administrative electoral matter in the full jurisdiction dispute, which has proven to be an effective corrective factor in the work of electoral administration, should be included in the Law on Election of Members of Parliament.

Thirdly, the position of the Administrative Court that the electoral commission may ex officio declare the elections null and void in individual polling places on the grounds of observed irregularities (e.g. incorrectly calculated results, finality of the electoral action, or no complaint filed) in the procedure of protecting electoral right, in absence of a complaint by the entitled parties, raises a number of serious questions. Therefore, the legislator should deal with all of them promptly.

Fourthly, there is a discrepancy between the provision of Article 32 of the Law on Local Elections, which stipulates that authorized representatives have a right to inspect the election material on the official premises of the electoral commission no later than five days after the elections were held, on the one hand, and the provision of Article 52 of the Law on Local Elections, according to which the 24-hour time limit for filing a complaint begins from the moment the municipal electoral commission has completed the reception of the election materials and filed of data from polling places, which effectively prevents corrections of any inconsistencies noticed during the inspection of the election materials.

The second general group of conclusions pertains to the deprivation of legal protection of electoral right due to inobservance of the order of legal remedies, ignorance of the law, and losing one's way in the labyrinth of procedural regulations related to the procedures for parliamentary and local elections. The appeals were often rejected due to confusion or miscalculation of deadlines for complaints and appeals. Likewise, the parties made mistakes and missed deadlines due to making incorrect analogies with the elections for the national assembly, which caused them to file appeals to the Administrative Court through electoral commissions,

instead of directing them directly to the Administrative Court, thus often making their appeals untimely. Therefore, it is necessary to harmonize the provisions of corresponding laws.

The third group of conclusions pertains to the ways in which the Administrative Court managed to significantly correct the irregularities in the work of electoral administration. Firstly, it allowed complaints and rejected appeals in cases of incorrect instructions on legal remedies. Secondly, it specified that the reception of a list of candidates and its announcement represent electoral activities in the candidacy process that fall within exclusive purview of the electoral commission and that may not be delegated to other administrative authorities. Thirdly, the Court disallowed the formation of a new category of proposers of lists of candidates. Fourthly, the Court annulled without exceptions the decisions of electoral commissions for procedural infringements or for inconsistencies of administrative acts of electoral commissions. Finally, and most importantly, the Court denied the announcement of lists of candidates in the full jurisdiction disputes, dissolved electoral committees, and ordered a repetition of elections in specific polling places, which significantly accelerated the elimination of illegalities in the election procedure.

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УПРАВНО-СУДСКА ЗАШТИТА ИЗБОРНОГ ПРАВА
− са анализом праксе управног суда србије −

Резиме

Аутори су анализирали судску праксу Управног суда Србије, која се односи на судску заштиту изборног права у току парламентарних и локалних избора 2012. и 2014. године, као и материјалноправне прописе којима је ова материја уређена. Анализа је за главни циљ имала утврђивање у којим су стадијумима изборног процеса, као посебног управног поступка, настајале повреде изборних права и због чега је до њих долазило. Следећи циљ био је процена квалитета меродавне материјалноправне регулативе и процесне – управне и судске заштите, са интенцијом указивања на могуће правце унапређења, да би се у будућности, свеобухватнијом регулативом ове врсте управног поступка и судске контроле његових резултата, могућности таквих повреда елиминисале из правног система Србије, чиме би се оснажио легитимитет изабраних органа и допринело ефикасности деловања изборне администрације.

Главни налази аутора јесу да би законодавац требало боље да регулише правно овлашћење изборних комисија да по службеној дужности пониште изборе, тј. и без приговора овлашћених странака, да је странкама ускраћивана правна заштита због недовољног разумевања разлика у прописима којима су нормирани

национални избори на једној, и локални избори на другој страни, и да би Управном суду Србије требало дати шира овлашћења, с обзиром на то да се његова улога у пракси показала као добар коректив у односу на нерегуларности у поступању изборне администрације.